Testimony of

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on behalf of

Consumers Union
Consumer Federation of America
Free Press

before the

United States House of Representatives
Energy and Commerce Committee
Subcommittee on Telecommunications and the Internet

regarding the

Committee Print on the
Communications Opportunity, Promotion, and Enhancement Act of 2006

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SUMMARY

Consumers Union,[1] Consumer Federation of America,[2] and Free Press[3] appreciate the opportunity to testify on the issue of national video franchising and competition in video services. We welcome the Subcommittee's interest in fostering greater consumer choice by promoting competition in the concentrated cable marketplace.

Consumers have suffered under monopolistic cable pricing that has resulted in a 64 percent increase in rates—approximately two and a half times the rate of inflation—since Congress deregulated the cable industry in the 1996 Telecommunications Act. In addition to skyrocketing rates, consumers have virtually no choice of providers or channel offerings. Satellite television, the primary competitor to cable, has had little price disciplining effect. In the few areas where actual facilities-based competition exists, consumers enjoy cable prices that are 15 percent lower than non-competitive markets.[4] A national franchise system with strong consumer protections and appropriate provisions to meet local needs could foster new video competition and discipline ever-rising cable rates.

Unfortunately, the Communications Opportunity, Promotion and Enhancement Act not only fails to ensure the national franchising system it creates will benefit consumers, it almost surely represents a significant step backward. While the legislation laudably protects community rights to establish broadband networks, it eliminates other protections that ensure all residents have access to competitive, advanced communications services. The legislation abolishes communities' authority to ensure all residents are served by new and existing cable providers without establishing any federal build-out requirements in its place, opening a wide door to redlining. It rolls back state and local authority to establish and enforce consumer protections without requiring new, strong federal protections. And it strips the Federal Communications Commission of its authority to establish rules ensuring that broadband network owners do not impair or block consumer access to competitive Internet content, services or applications. Moreover, enforcement provisions within the legislation are weak or absent. In short, the legislation not only fails to ensure that consumers will benefit from new video competition, it may expose them to the risk of higher cable rates, reduced quality and reduced access to competitive choices offered via the Internet.

CONSUMERS WHO MOST NEED COMPETITION WILL BE THE LEAST LIKELY TO RECEIVE IT

Because the legislation does not require new cable providers operating under a national franchise to serve all consumers within a franchise area, new entrants will be free to offer service to only wealthy neighborhoods, leaving behind middle and low-income consumers who most need cable rate relief. It also eliminates the existing authority of communities to require that cable providers serve all residents—something virtually every franchising authority has done. To ensure that the benefits of competition come to those who need it most, the legislation should require telephone companies entering the video market to build out their services to all consumers within a franchise area over a reasonable period of time, with appropriate accommodations for very low-density areas. This is not only critical to ensure video competition will discipline cable rates, it is also central to reversing the alarming trends in the broadband market. Next generation cable services bring broadband as well. Absent a build-out requirement, underserved areas will be permanently stranded on the wrong side of the digital divide.

Skepticism that telephone companies will offer their video services to all residents rather than just the wealthiest is particularly warranted given SBC's statements last year that it would roll out Project Lightspeed, the company's IPTV video offering, to 90 percent of its high-value customers. It defined "high-value" customers as those willing to spend up to $200 on communications services per month. They make up just 25 percent of SBC's subscriber base. SBC also contended it would provide the video service to just 5 percent of low-value customers that constitute 35 percent of its customer base.[5] Assurances that "low-value customers" would still be able to receive satellite video through SBC's affiliation with Dish Network ring hollow, given the failure of satellite to provide meaningful price discipline. Instead, SBC's statements suggest it will offer services only in largely affluent areas, disregarding communities made up predominantly of low- or middle-income consumers.

Similarly, Verizon's conduct to date strongly suggests it is seeking franchise agreements for its FiOS service in only the wealthiest counties in the country. For example, Verizon has negotiated or signed franchise agreements with largely affluent local franchise areas—such as in Fairfax County, Va. (where it has four franchise agreements in place for Herndon, Fairfax County, Fairfax City and Falls Church); Howard County, Md.; Massepequa Park in Nassau County, N.Y.; Nyack and South Nyack, in Rockland County, N.Y.; and Woburn in Middlesex County, Mass. In terms of median family income, Fairfax County ranks No.1 nationally; Howard ranks fourth; Nassau 10th; Rockland 12th and Middlesex 17th.[6] New Jersey, in which Verizon is seeking a statewide franchise but resisting state-wide build-out requirements, is home to 12 of the top 100 richest counties in the nation.

Verizon has agreed to universal or nearly universal build-out requirements in several of its franchise agreements. Given the wealth of those areas and the current authority of those franchise authorities to require build-out, Verizon's agreement reveals little about whether the company will voluntarily build-out to all parts of mixed-income franchise areas, assuming it even enters them. What those commitments do show is both that build-out has been important to those localities and that it need not be a barrier to the company's entry. On the contrary, Verizon has quickly negotiated agreements that offer substantial community services and consumer protections.

SBC's lightly veiled admission of its plans for economic redlining and Verizon's video franchising practices suggest new entrants will enter only largely affluent, densely populated franchise areas and that if they enter mixed-income franchise areas (those with both high and low income populations), they'll provide service only to portions of those markets unless required to serve all residents.

To effectively enhance competition and ensure that its benefits come to all consumers, any national franchising legislation must require new entrants to build-out their services to all consumers over a reasonable period of time. Particularly in areas where telephone companies already have facilities, build-out should be timely and mandatory.

In the absence of national build-out requirements, Congress should establish financial incentives for new entrants to serve the entire community. Telephone companies that do not agree to serve the entire community should be required to provide sufficient financial resources to local communities, in addition to reasonable rights-of-way fees paid, for use in fostering alternative means of ensuring broadband competition. Those resources could be used to establish community broadband networks, competitive commercial services to areas unserved by the new entrant, or other means of assistance to help low-income consumers access advanced telecommunications services at affordable prices and meet local community communications needs.

CONSUMERS MAY BE DENIED SERVICE UPGRADES BY INCUMBENT CABLE PROVIDERS

The legislation allows incumbent cable providers to jettison the build-out and upgrade requirements to which they are bound under local franchise agreements whenever a new market entrant offers service to just one household in the franchise area. If a telephone company offers its video service in only part of the franchise area, as they are allowed to do under the legislation, an incumbent cable provider will have both the ability and the financial incentive to offer service upgrades to competitive areas while denying them to customers in neighborhoods not served by the new entrant. Even the National Cable and Telecommunications Association has pointed out the importance of providing network upgrades in an equitable and non-discriminatory manner.[7] Unfortunately, under the legislation, incumbent cable providers will be under no obligation to do so, and the communities they serve will be stripped of their ability to require non-discriminatory upgrades. Even more troubling, a cable incumbent operating under a national franchise would be equally free to withdraw service entirely from neighborhoods it currently serves.

CONSUMERS MAY SEE THEIR CABLE RATES RISE, NOT FALL

The legislation also fails to protect consumers from discriminatory pricing that may result when local exchange carriers begin offering video service in a franchise area. Under current law, cable providers need no longer comply with the statutory requirement that they charge uniform rates across the franchise area once a common carrier offers video service to just a single household in that area. The legislation does nothing to change that. Therefore, under the legislation, an incumbent cable provider could lower rates in areas served by new competitors and raise them elsewhere to offset discounts. And regardless of how limited the competition, cable is given free-reign to price discriminate. Consumers who are not served by the new Bell competitor would be hit twice—they will lack a competitive alternative to the incumbent and they may face higher cable rates and declining service quality. If Congress does not require that new entrants build out to the entire franchise area, it must, at a minimum, require that cable incumbents maintain a uniform rate structure until uptake of competitive telecommunication video services reaches a significant threshold.

ANTI-REDLINING PROVISIONS ARE INSUFFICIENT TO ENSURE LOW- AND MIDDLE INCOME CONSUMERS ARE NOT LEFT BEHIND

The legislation appropriately prohibits redlining based on income. Unfortunately, in the absence of build out requirements, the anti-redlining provision, on its own, will be not be sufficient to ensure low-income areas will be served by new video providers. Existing Title VI anti-redlining provisions have only been effective because they exist *in tandem* with the ability of local franchise authorities to require service throughout the franchise area over time. Without requirements for build-out, anti-redlining provisions are toothless.

Moreover, redlining, particularly as defined in this bill, will be difficult to prove and violations will be difficult to enforce. So long as the burden lies with authorities to prove that income is the sole reason a cable company has denied service or upgrades, the anti-redlining provision will be largely symbolic. Providers may justify failure to provide service to particular neighborhoods based on insufficient demand or economic infeasibility. Therefore, any anti-redlining prohibition should place the burden of proof on cable providers, not local, state or federal authorities. That is, the providers should be required to prove that service denial is justified for reasons other than income.

The legislation should also provide for concurrent anti-redlining enforcement by states and localities and include strong penalties for violations. Localities, in particular, have specific knowledge of local economic circumstances; a providers' service history in the community; and other knowledge that allows them to identify redlining concerns. They are also more accountable and responsive to their citizens than federal regulators and are more likely to take timely action to resolve redlining concerns.

In addition, to improve the effectiveness of anti-redlining enforcement, the legislation should require the FCC to collect data that will allow enforcement authorities to identify redlining violations. Currently, FCC lacks data that would help identify patterns of service and potential redlining in broadband—the technology over which telephone companies will deliver video services. Additional reporting requirements and analysis should be part of the systematic process of oversight. Cable service providers should be required to submit regular reports about the location, density, and level of service offered in each franchise area. Finally, the bill should provide for cross-tabulation of census data with the cable service provider reports to identify.

CONSUMER PROTECTIONS ARE WEAKENED

Under current law, states and localities have authority to establish more stringent cable customer service standards than required by federal law. Localities are able to enforce those standards through the terms of and renewal process for their local franchising agreements. Many franchise authorities have staff and offices dedicated to resolution of cable complaints that provide for speedy resolution of customer billing concerns, service outages and more. Penalties in the form of liquidated damages or mandatory discounts for customers harmed by a provider's violation of customer service standards are not uncommon.

The Communications Opportunity, Promotion and Enhancement Act strips states and localities of their authority to both establish and enforce consumer protections that exceed the federal minimum standards and gives enforcement authority solely to FCC, significantly weakening consumer protections. States and localities will have only the ability to issue compliance orders when providers violate Commission standards. They can take no enforcement action of their own unless FCC regulations so prescribe, raising serious concerns about the timeliness and resolution of complaints. Communities, now empowered to resolve customer disputes with their cable provider, would be left with only the ability to issue compliance orders that FCC alone may enforce.

Any national franchise legislation should retain state and local authority to establish customer service standards and consumer protections. Consumers must have a means for timely and local resolution of complaints against their service providers. Federalizing consumer protection is neither workable nor acceptable. The Federal Communications Commission is ill-equipped to address billing, services and outages complaints in a timely manner. Customer service, the process for resolving complaints, reporting requirements and accountability of providers to officials must remain local, with appropriate and meaningful sanctions for violations. At a minimum, the legislation should provide for strong federal minimum consumer protection requirements that reflect the more stringent criteria established to date by states and localities and provide states and localities with concurrent enforcement authority.

Finally, the legislation inexplicably and immediately eliminates the existing federal requirement that cable companies provide consumers with 30-day advance written notice before changing channel assignments. This uniform and common sense provision helps reduce consumer confusion and improves the accountability of cable providers. Even on the theory that competition under a national franchise may help discipline anti-consumer practices, under the legislation as drafted, many consumers in a given market will be without that competitive alternative. In fact, even if a telephone company offers service to just one household or one neighborhood, the dominant incumbent cable provider in that franchise area could seek a national franchise and be released from the written notice provision. Congress should maintain this commonsense consumer protection.

BROADBAND DISCRIMINATION PROTECTIONS ARE INADEQUATE

It is critical that any video franchising legislation include strong, enforceable network neutrality policies required to protect consumers and preserve the Internet as a source of innovation and competition. However, as drafted, the network neutrality provisions in Section 201 of the Communications Opportunity, Promotion, and Enhancement Act are inadequate to protect consumers from network-owner discrimination against competitive, Internet-based content, applications, and services. Relying on the FCC's policy statement on network nondiscrimination is insufficient. There is no mention in that statement of protection against the practice many network operators have announced they will undertake—dividing the Internet into pay-for-play tiers of service, or "access tiering." Unfortunately, the legislation not only fails to provide for stronger protections than encompassed in FCC's policy, it simultaneously strips the FCC of its rulemaking authority to protect consumers from discriminatory network practices and provides for only case-by-case enforcement of FCC's already weak network neutrality policy.

Services, content and applications delivered via broadband offer consumers new opportunities for competitive telecommunications and video services. But the telephone and cable companies that dominate the broadband market have strong incentives to shut out those competitors through access tiering, by impairing transmission, or by prohibiting use of devices or applications on their networks. To protect consumers, Congress should pass clear legislation and require the FCC to issue strict and enforceable regulations prohibiting discriminatory practices. The enforcement process must be timely and require the network operator to bear the burden of proof. We must ensure that no entrepreneur is posthumously vindicated by the FCC after a complaint process drags on for months. In short, the FCC's authority must be expansive and its direction clear.

As subscription video services are increasingly offered using Internet-based technologies, maintaining the Internet as a neutral platform on which network owners cannot discriminate becomes even more essential. The Bells are not the only providers who could compete with cable. Increasingly, "video on demand" is being offered over the Internet, where consumers can access movies or pay to watch a single episode of a single program. As Congress considers ways to increase competition in video services, it must not overlook independent Internet content providers as a third competitor. But that source of competition will be squelched without strong, enforceable prohibitions on network discrimination. Both cable and telephone companies can use their network control to prioritize their own video content over others.

Moreover, a network neutrality policy that permits "access tiering" virtually guarantees higher consumer prices. Recent media reports describe operators' plans to create "access tiers" of service that will charge Internet companies fees to bring their products and services to subscribers. The fees charged to content and service providers will inevitably be passed onto consumers who have already paid for high-speed access. Though this may be rational market behavior for short-term return on investment, it is patently discriminatory and reflects a fundamental change in the nature of the Internet. Only those companies who can afford to pay for access will be able to reach consumers, stifling innovation, impeding competition and hiking end user costs. Hidden costs and discriminatory prices are anathema to consumer interests.

Ironically, both cable and telephone companies who now object to strong network neutrality legislation have a lengthy record of using their market control to preclude competition. And in recent weeks, these same players have complained about the discriminatory practices of their own competitors. AT&T has complained that Time Warner has refused to run telephone industry advertisements supporting national franchising on its cable network. Time Warner has filed complaints against incumbent telephone companies over refusals to provide interconnection for its VOIP services. And Verizon has complained that Rainbow Media, and its parent company Cablevision, are denying Verizon carriage of its regional sports cable networks. The complaint explicitly sites the discriminatory practices of a cable operator using market power to eliminate competition.

In each of these cases, the discriminating party is using its control over the network to preclude a competitor. There is every reason to believe the both dominant cable and telephone providers will likewise use their control over broadband networks to discriminate against Internet-based companies that offer services that compete with their own.

With a strong network discrimination prohibition, the promise for competition in video will come not just from Verizon and AT&T, but from any other entrepreneurial company that offers video via the Internet in a manner more appealing to consumers. Without such a prohibition, however, that promise of competition and innovation will be lost.

MORE PROTECTIONS ARE REQUIRED TO ENSURE COMMUNITY NEEDS ARE MET

While the legislation includes requirements that any provider operating under a national franchise meet basic obligations to serve the community, we are concerned that the legislation falls short in a number of areas.

- **Institutional Networks:** The legislation maintains existing obligations of incumbent cable companies to provide institutional networks (I-Nets) for schools, libraries and government buildings under their local franchise agreement, but makes no provision for communities who may not yet have an I-Net but have existing authority to negotiate for one. I-Nets have played an important role in providing communities with advanced communications services and have been critical in helping to bridge the digital divide. If localities are to be stripped of their ability to negotiate for these networks, any national franchise should also provide for national uniform requirements for I-Nets in communities that lack them.

- **Local, Independent and Diverse Programming**: The legislation laudably requires new entrants to carry any public, education and government (PEG) access channels already carried by incumbents under incumbent franchise agreements and provides for incremental improvements in capacity over time. But, as with I-Nets, it fails to establish a national minimum requirement for carriage of local, independent channels, leaving those communities who lack carriage of such channels currently, but retain authority to negotiate for them, with no recourse. The legislation could remedy this by establishing a national minimum carriage requirements in all franchise areas.

Moreover, while establishing national requirements for financial support of institutional networks and public access channels, carriage of PEG channels, and local franchise fees, the bill provides for no explicit enforcement of those requirements. The only penalty for noncompliance appears to be franchise revocation—a heavy hammer FCC will be reluctant to bring down. Currently, localities enforce those provisions through their franchise agreements. Communities can prevent violation of franchise agreements before they occur by including penalties within their agreements. National franchise legislation must provide for explicit enforcement of franchise conditions in a manner that empowers communities and states to ensure the needs of communities are being met by video providers.

TO FOSTER VIDEO COMPETITION, THE LEGISLATION SHOULD INCLUDE PROHIBITIONS ON PROGRAMMER TYING ARRANGEMENTS

In order for true price competition to emerge in multichannel video markets, Congress must also address anticompetitive tying requirements imposed by dominant media companies.

At the same time that the cable distribution market has consolidated, concentration in video programming has increased dramatically. Broadcast giants and cable programmers have merged; broadcast and satellite distributors have merged; and cable distributors increasingly offer their own programming or have gained ownership stake in other video programmers. The anticompetitive effects of concentration in video programming decreases the likelihood that new Bell video market entrants will be able to effectively compete on price and on channel offerings.

Program carriage contracts typically stipulate that distributors offer several or all of the programmer's channels in the most widely viewed tier (usually the expanded basic tier), regardless of consumer demand for them, and prohibit channels from being offered to consumers individually or in specialty tiers. These bundling requirements have contributed to increased size and price of the expanded basic tier, which has increased in cost by two and a half times compared to the basic tier.[8]

Media companies can secure these commitments because of their market power. Six media giants, including the top four broadcasters, dominate the programming landscape, accounting for three-fourths of the channels that dominate prime time.[9] Four are networks (ABC, CBS, FOX and NBC) and two are cable operators (Time Warner and Comcast). The networks use the retransmission consent negotiations for carriage of the local stations they own and operate to leverage local cable carriage of their other channels. These six companies also completely dominate the expanded basic tiers and the realm of networks that have achieved substantial cable carriage. These six entities account for almost 80 percent of the more than 90 cable networks with carriage above the 20 million subscriber mark.

Moreover, cable operators are majority owners of one-fifth of the top 90 national networks—a substantial stake in the programming market.[10] They also own minority stakes in other networks, as well. The Government Accountability Office found that vertically integrated distributors or those affiliated with media companies are more likely to carry their own programming, [11] contributing to the size and cost of the expanded basic tier. These vertically integrated networks continue to have the largest number of subscribers,[12] and are the most popular.[13] Program ownership by dominant incumbent cable distributors also provides the incentive to withhold carriage of cable networks they own from competitive video distributors. This is the basis of Verizon's recent complaint against Rainbow Media and Cablevision over sports channel carriage.

Independent, unaffiliated cable distributors that do not own their own programming have consistently expressed concerns about exclusionary tactics, contractual bundling requirements, and coercive retransmission consent negotiations that limit their ability to respond to customer demand for more choice in program packages and for lower prices.[14]

It is therefore essential that Congress include in any national franchise legislation provision that address anticompetitive and coercive contractual requirements, including retransmission consent abuse. Failure to do so will impede the ability of any new video market entrant, including Verizon and AT&T, to compete on price. They'll be forced to buy the same channels their competitor is carrying; pay the same or greater licensing fees; and offer the same packages. Worse, they will be precluded from offering consumers channels individually or in specialty tiers, rather than in a large and costly bundle, even though doing so may give them an opportunity to differentiate their services from the incumbent cable monopoly and respond to strong consumer demand for greater channel choice.

THE RIGHT OF MUNICIPALITIES TO PROVIDE BROADBAND NETWORKS IS PROTECTED

We offer our strong and unqualified support for Section 401 of the legislation, which prohibits state preemption of municipal broadband networks—a critical component of any legislative package that seeks to increase consumer access to advanced telecommunications services and foster competition in data, video and voice services, and expand affordable high-speed Internet access to all Americans.

Hundreds of communities have responded to the lack of affordable broadband access by creating their own networks through public-private partnerships, offering new opportunities for entrepreneurs. Community broadband networks offer an important option for communities in which broadband services reach only certain areas or are offered at prices out of reach for many consumers. Equally important, the mere possibility that a community may develop a broadband network helps discipline the marketplace.

Efforts to prohibit these community networks stifle competition across a range of telecommunications services, stall local economic development efforts, and foreclose new educational opportunities. Section 401 ensures that communities that want to foster broadband access are not precluded from doing so.

CONCLUSION

The need for greater competition in the monopolistic video marketplace is an urgent one—but it has been urgent for a decade. We urge Congress to take the time to consider the many policy issues that must be addressed before abandoning the fundamental consumer protections encompassed in current law. These include mandatory build out requirements or in lieu thereof resources to meet the needs of underserved consumers; provisions that prevent cable providers from backsliding on their current obligations to serve the entire community; strong consumer protections with state and local enforcement authority; prohibitions on anticompetitive contractual channel bundling requirements that reduce consumer choice and prevent product differentiation; and a strong enforceable prohibitions on broadband network discrimination.

We thank the Subcommittee for the opportunity to testify and look forward to working with you on legislation that promotes competition in the video marketplace that benefits all Americans.

Endnotes

[1] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the state of New York to Provide consumers with information, education and counsel about good, services, health and personal finance, and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of *Consumer Report*s, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* with more than 5 million paid circulation, regularly, carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.
[2] The Consumer Federation of America is the nation's largest consumer advocacy group, composed of over 280 state and local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power an cooperative organizations, with more than 50 million individual members.
[3] Free Press is a national nonpartisan organization with over 200,000 members working to increase informed public participation in crucial media policy debates.
[4] GAO-04-8**,** p. 11.
[5] USA Today. **"**Cable, phone companies duke it out for customers," June 22, 2005.
[6] U.S. Census Bureau. Median Family Income; Counties within the U.S., 2004 American Community Survey.
[7] National Cable & Telecommunications Association, 2006, "The Bell Monopolies Want a Special Break to Enter the Video Business." Http://www.ncta.com/pdf_files/Bell_Myths_FINAL_03.06.06.pdf
[8] Mark Cooper, *Time to Give Consumers Real Cable Choices,* Consumer Federation of America & Consumers Union, July 2004, p. 5.
[9] MM Docket No. 92-264, Comments of CFA, CU, Free Press in the Matter of The Commission's Cable Horizontal and Vertical Ownership Limits and Attributions Rules., August 8, 2005.
[10] GAO-04-8, p. 27.
[11] Id. at 29.
[12] Federal Communications Commission, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming: Eleventh Annual Report, January 14, 2005, ¶150.
[13] Id. at ¶151.
[14] EchoStar Communications Corporation, Testimony of Charles Ergen, Chairman & CEO, EchoStar Communications Corporation before the Senate Committee on Commerce, Science and Transportation, January 19, 2006; Testimony of Bennett Hooks, Chief Executive Officer, Buford Media Group on behalf of the American Cable Association, before the Subcommittee on Telecommunications and the Internet, July 14, 2004.